28263. Misbranding of canned peas. U. S. v. 237 Cartons and 386 Cartons of Peas. Decrees of condemnation. Product released under bond to be relabeled. (F. & D. Nos. 40870, 40873. Sample Nos. 55061–C, 55062–C.)

This product fell below the standard established by this Department because the peas were not immature, and it was not labeled to indicate that it was substandard. It was labeled "Garden" peas but in fact was field-grown peas.

On November 19, 1937, the United States attorney for the District of Massachusetts, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 237 cartons of canned peas at Fitchburg, Mass., and 386 cartons of canned peas at Worcester, Mass., alleging that the article had been shipped in interstate commerce on or about July 7, 1937, by the Melrose Canning Co. from Greenmount, Md., and charging misbranding in violation of the Food and Drugs Act as amended. The article was labeled in part: "Loveland Garden Peas [or "Evelyn Garden Peas"] * * * Packed by Melrose Canning Co. Hanover, Pa."

The article was alleged to be misbranded in that the term "Garden" was false and misleading and tended to deceive and mislead the purchaser when applied to field-grown peas; and in that it was canned food and fell below the standard of quality and condition promulgated by the Secretary of Agriculture since the peas were not immature, and the package or label did not bear a plain and conspicuous statement prescribed by the Secretary of Agriculture indicating that it fell below such standard.

On January 3, 1938, the Melrose Canning Co., Hanover, Pa., claimant, having admitted the allegations of the libels, judgments of condemnation were entered and the product was ordered released under bond conditioned that it be properly relabeled under the supervision of this Department.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

28264. Alleged adulteration and misbranding of jellies. U. S. v. 365 Cases of Assorted Jellies and other products; also U. S. v. 60 Cases and 80 Cases of Assorted Jellies. The former tried to the court and a jury. Directed verdict for the claimant. Decrees entered in both actions ordering libels dismissed and products returned to claimant. (F. & D. Nos. 38193, 39597, 39598. Sample Nos. 3433–C, 3434–C, 35940–C, 35941–C.)

On September 10, 1936, the United States attorney for the Western District of Texas, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 365 cases of jellies, jams, preserves, and marmalade at El Paso, Tex., alleging that the articles had been shipped in interstate commerce on or about February 26, March 31, May 27, and July 12, 1936, by the Tropical Preserving Co. from Los Angeles, Calif., and charging adulteration and misbranding in violation of the Food and Drugs Act. On January 27, 1937, an amended libel was filed, which covered 106 cases of jellies only, shipped as alleged in the original libel.

On May 19, 1937, a libel was filed against 130 cases of jellies at El Paso, Tex., alleging shipment by the Tropical Preserving Co. from Los Angeles Calif., on or about April 9, 1937, and charging adulteration and misbranding. The said jellies were labeled in part: "Tropical Brand * * * Jelly * * * Tropical Preserving Co. Los Angeles, Calif."

The amended libel alleged adulteration of the jellies in that water, pectin, and excess sugar (some lots also containing added acid) had been mixed and packed with the articles so as to reduce and lower their quality and strength in that the said products had been made from less fruit juice and more sugar than jellies should be made from, namely, equal or approximately equal parts of fruit juice and sugar in the original batch, and the said products all contained added pectin (and in some instances added acid) and water which should have been removed by boiling in the manufacture of the article: in that products made from less fruit juice and more sugar than jellies should be made from, namely, equal parts or approximately equal parts of fruit juice and sugar in the original batch together with excess added water and pectin (and in the case of certain varieties also added acid) not ingredients of jellies and in semblance of jellies, had been substituted for pure jellies, which they purported to be; and in that they had been mixed in a manner whereby inferiority was concealed.

They were alleged to be misbranded in that the statements "Pure Concord Grape [or "Black Cap Raspberry," "Strawberry," "Loganberry," "Red Raspberry," "Blackberry," "Currant," or "Red Raspberry-Apple"] Jelly Home Made Style," borne on the labels, were false and misleading and tended to deceive and mislead the purchaser; and in that they were imitations of and were offered for sale under the distinctive names of other articles.

On October 15, 1937, L. H. Karosen, trading as the Tropical Preserving Co., having appeared as claimant in the action first instituted, the case came on for trial before the court and a jury. On October 19, 1937, the evidence having been adduced counsel for the claimant and for the Government moved for peremptory instructions. Following the completion of arguments of counsel in support of their respective motions the court delivered the following rulings, opinion, and decision orally from the bench:

BOYNTON, *District Judge:* This action is in its nature a libel brought by the Government under the Food and Drugs Act as amended for the seizure and condemnation of articles of jellies, commodities which are designated as jellies, a description of which is set forth in the caption of the libel and further in detail in the allegations contained in the bill, wherein the libel seeks to have the commodities condemned as adulterated within the meaning of the Food and Drugs Act in the third count of the libel, and further in the fourth count as in violation of the Food and Drugs Act, Sec. 8 thereof, as being misbranded within the contemplation of the Act, on the grounds as set forth in the libel.

The court, in entering upon consideration of the questions of law and fact involved in this case, finds that there was no particular detail as to formula as to what constitutes jelly as set forth in the provisions of the Act, or in rules that may have been promulgated by the Secretary of Agriculture in connection therewith.

The Government, for recovery in this case, contends that jelly is such a well known and recognized commodity in the commercial world in the States of the United States as to have a strict standard as to what constitutes jelly. That it is recognized in the trade that jelly should consist of fifty parts of fruit juice and fifty parts sugar; and the Government's contention in this case is that the jellies here in question are shown not to contain ingredients of fifty parts of fruit juice and fifty parts of sugar, as disclosed by analyses as made by chemists, who are offered as witnesses on behalf of the Government, and who testified on trial of this cause that there was more water contained in the jellies here in question than would have been the case had fifty percent fruit juice and fifty percent sugar been used in the manufacture thereof, and by reason thereof that resulted in lessening the ingredients in what is known and recognized as jellies according to the Government's contention, and therefore is an adulteration, shows an adulteration coming within the meaning of the Food and Drugs Act, and that, while the same was labeled as jellies, it is a misbranding.

The court finds under the provisions of the Food and Drugs Act, as set forth in Clause 4 of Section 8 of the Act, and subdivisions thereunder, viz, first and second, that jelly is a compound and that it falls under the provisions of the fifth clause of Section 8 of the Act, which relates to canned food in hermetically sealed containers as therein set forth; and that under the evidence in this case it is not shown that the jellies here in question, seven varieties of jellies, samples of which are offered in evidence herein, contained in 365 cases of assorted jellies, in controversy in this case, to be adulterated within the meaning of the Food and Drugs Act, making special reference to Clause 4 under Section 8 of the Act, and Clauses First and Second and Clause 5. As the uncontroverted evidence in this case shows that no foreign substance, that is, no ingredients foreign to that which is contained in fruit juice, was injected into the manufacture of the jellies in question.

According to the testimony of the Government's witnesses, chemists, and analyses here it discloses, and said witnesses testified to the effect that there was no ingredient found in these jellies that are not contained in jellies, "pure jellies"; but that the difference, if any, from what the Government contends is standard, as recognized by the public, of fifty parts of fruit juice and fifty parts of sugar, has added in this compound, as contained in these jellies here in question, an excess of water.

The court in passing on this question takes into consideration all of the testimony that is offered on trial of the case, and finds that there are no ingredients contained in the jellies here in question that are not contained in jellies produced in accordance with the standard as contended for by the Government in this case, as to the quantity of fruit juice and sugar.

There is testimony in this case by the claimant herein, L. H. Karosen, the manufacturer, doing business as Tropical Preserving Co., and Victor J. Morley, the superintendent of that preserving plant, located at Los Angeles, Calif., that in the manufacture of these jellies in question that 50 percent of fruit juice and 50 percent sugar was used in each and every instance in the manufacture of the

same, and testifying that there was no pectin or acid added to the jellies when manufactured.

The Court therefore holds that the Government's evidence in this case, relying upon analyses that were made, and upon same only, is of a character that is insufficient, speculative in its nature, such as is insufficient to meet the burden that rests upon the Government in a case of this character, which is penal in its nature.

The Court also makes the same finding and the same ruling on the count of misbranding which is here predicated and based upon the adulteration. The Court bearing in mind and carefully considering decision of the Supreme Court of the United States in the case of *United States* vs. *Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar*, Douglas Packing Company, Claimant, reported in 265 U. S. 438; and regards the decision rendered by the Court in said case, and the language used in the Court's opinion therein, in which the Court uses this language:

"If an article is not the identical thing that the brand indicates it to be, it is misbranded. The vinegar in question was not the identical thing that the statement 'Excelsior Brand Apple Cider Vinegar made from selected apples,' indicated it to be,"

is in support of the Court's ruling in this case on the question of misbranding. That case, and all cases which the Court has been cited undertaking to rule upon the question of whether or not the charge of misbranding as used upon the label or package in question constitutes a violation of the Food and Drugs Act, finds that there was some specific, direct, definite and distinct language used on the label in question on the commodities in question which was in its nature misleading. If the Court construes aright the decision of the Supreme Court in the case, supra, reported in 265 U. S. 438, the decision in that case holds misbranding, the articles to be misbranded, is by reason of the fact that the article there is referred to as "Excelsior Brand Apple Cider Vinegar made from selected apples," and that it was shown in said cause that the vinegar there in question was not apple cider vinegar made from selected apples, but was,—so declared in that decision,—made from dried apples, and that you could not make apple cider vinegar,—it was not apple cider vinegar that was made from dried apples, and this reference to selected apples conveyed the idea of fresh apples.

This jelly here in question in the suit at bar, there is no question whatever but what the same was made from fruit juice of the character of fruit designated in each one of the labels, and therefore the Court is of opinion, and so holds, that there was no misbranding; that is that the labeling of the jellies here in question was not of a character as to mislead the public, purchasers or consumers of such jelly, as in the case of *United States* vs. *95 Barrels of Vinegar*. In this particular case there was no ingredient used that was not contained in jellies made in accordance with even the standard as contended for by the Government.

Therefore, gentlemen, without further elaborating the Court's findings in this case, the Court will give the jury a peremptory instruction to return a verdict against the Government, and in favor of claimant in this case.

The Court regards this case as a case of grave importance, that the burden rests upon the Government to make out its case with clear, satisfactory, convincing evidence, which, in the opinion of the Court, has not been met.

This cause, as counsel for the Government says, is somewhat in the nature of blazing the way, and there is no case that has been presented to the Court, or acted upon by any Court, similar in its character. With reference to the record in this case, the record is full and complete and can be taken up and this question passed upon by the Higher Courts and determine whether or not the facts disclose an adulteration or misbranding within the meaning of the Food and Drugs Act under the language as used by the Act. Perhaps the Secretary of Agriculture some day will promulgate some rules and not leave the matter in the realm of uncertainty and speculation, as this Court feels is the case in this particular cause.

The Court will overrule all exceptions urged by counsel for the claimant herein, as the Court announced it was reserving its ruling upon such matters, objecting to the witnesses being permitted to testify, and who were allowed to testify by the Court in this case, and whose testimony is in the record, but the Court reserved definite ruling upon the same, as bearing upon the question of what was recognized in the trade as good commercial practice as to the formula,

if there existed any, as to the ingredients that entered into the manufacture of commodities designated as jellies; so you will have a complete record in the case.

The jury returned a verdict as instructed. On October 19, 1937, judgment was entered ordering the goods returned to the claimant. On December 22, 1937, judgment was entered in the remaining case ordering the libel dismissed and the goods returned.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

28265. Adulteration of cauliflower. U. S. v. 150 Crates of Cauliflower. Decree of condemnation and destruction. (F. & D. No. 40982. Sample No. 63439–C.)

This product was contaminated with arsenic.

On November 16, 1937, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 150 crates of cauliflower at Seattle, Wash., alleging that the article had been shipped in interstate commerce on or about November 9, 1937, from Portland, Oreg., by the Pacific Fruit & Produce Co., and charging adulteration in violation of the Food and Drugs Act.

The article was alleged to be adulterated in that it contained an added poisonous or deleterious ingredient, arsenic, which might have rendered it injurious to health.

On November 29, 1937, the Pacific Fruit & Produce Co., having stipulated that immediate disposition of the product was necessary, judgment of condemnation was entered and the product was ordered destroyed.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

28266. Supplement to notice of judgment No. 27442. U. S. v. 185 Cases of Raisins. Default decree of condemnation and destruction. (F. & D. No. 39421. Sample No. 18680–C.)

On April 23, 1937, a libel was filed in the district court against 185 cases of rasins labeled "Regent Brand * * * Raisins Packed by Del-Rey Packing Company," at Memphis, Tenn., alleging that the article had been shipped by the California Packing Co. [Corporation] from Fresno, Calif., and charging that it was adulterated in violation of the Food and Drugs Act. On July 10, 1937, the product was condemned and ordered destroyed.

Subsequent investigation has developed that the product was not invoiced nor packed by the California Packing Corporation, but that it had been included in a shipment made by that firm as a courtesy. The investigation disclosed further that the goods had been invoiced by the Del-Rey Packing Co., of Del Rey, Calif.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

28267. Adulteration of apples. U. S. v. 300 Baskets of Apples. Decree of condemnation. Product released under bond to be washed. (F. & D. No. 41020. Sample No. 56429–C.)

This product was contaminated with lead and arsenic.

On September 7, 1937, the United States attorney for the District of Minnesota, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 300 baskets of apples at St. Paul, Minn., alleging that the article had been shipped in interstate commerce on or about September 2, 1937, by Leo Byars from Springdale, Ark., and charging adulteration in violation of the Food and Drugs Act.

The article was alleged to be adulterated in that it contained added poisonous or deleterious ingredients, lead and arsenic, which might have rendered it injurious to health.

On September 10, 1937, the C. H. Robinson Co., Minneapolis, Minn., claimant, having admitted the allegations of the libel, judgment of condemnation was entered and the product was ordered released to claimant under bond conditioned that the apples be washed so as to comply with the law.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

28268. Adulteration of apples. U. S. v. 2 Lots of Apples. Default decree of condemnation and destruction. (F. & D. No. 40934. Sample Nos. 50286–C, 50287–C.)

This product was contaminated with arsenic and lead.

On November 4, 1937, the United States attorney for the Western District of Wisconsin, acting upon a report by the Secretary of Agriculture, filed in the